IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LUANDA, J.A., MMILLA, J.A. And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 544 of 2015

JOHN SAYI @ SENGEREMA.....1ST APPELLANT

OTHINIELY NDONGO.....2ND APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tabora)

(Kaduri, J.)

Dated 3rd day of June, 2009

In

Criminal Appeal Nos. 148 & 149 of 2003

JUDGMENT OF THE COURT

18th & 24th August, 2017

MWARIJA, J.A:.

The appellants, John Sayi @ Sengerema and Othiniely Ndongo were charged in the District Court of Bariadi with the offence of robbery with violence contrary to sections 285 and 286 of the Penal Code [Cap 16 R.E. 2002]. It was alleged that on 20/11/2002 at about 20:00 hours at Sima area within Bariadi District in Shinyanga Region, the appellants did, through violence, steal various items total valued at sh. 280,000/= the property of one Yahaya s/o Said.

At the trial, the prosecution relied on the evidence of six witnesses including the Said Yahaya Said (PW1). It was not disputed that on 20/11/2002 in the night, the house of PW1 was broken into by bandits. Having done so, they entered into one of the rooms which was being occupied by PW1's sister in law, one Grace Andrew and stole from therein 21 pairs of batik fabric and a bicycle.

It was the prosecution's case that after the robbery incident, PW1 discovered that some of the stolen properties were in possession of three women, Suzan Limbu (PW2), Regina Joseph (PW3) and Debora Ndallawa (PW4). Whereas PW2 was found with 6½ pairs of the clothes, PW4 and PW3 were found with one and four pairs respectively. PW1 informed the police and as a result, PW2 and PW3 were arrested. The arrest was done by D/C Shadrack (PW5). On being questioned, they explained that they bought the clothes from certain "*Wamachinga*" (street vendors). Incidentally, while the said witnesses were being taken to police station, on the way, they pointed out the 2nd appellant to PW5 as one of the persons who sold the clothes to them. The said appellant was arrested and subsequently PW5 conducted a search in the room which the appellants were occupying.

The search was done in the presence of the appellants' landlord, Mahangila Malya (PW6). One pair of a batik fabric and a bicycle which were identified PW6 as parts of the stolen properties were found in room.

At the trial, the appellants denied the charge. In his defence, the 1st appellant contended that at the time of his arrest, he was residing in the 2nd appellant's room as a visitor after having arrived from Mwanza. On his part, the 2nd appellant admitted that he accommodated the 1st appellant as his guest. He learnt that later the 1st appellant had brought a bag but did not know what were contained in it. It happened however that on 22/11/2002, when he followed the 1st appellant at a rice milling machine to collect the key of the room in which they were residing, he found him selling batik fabric to PW2, PW3 and PW4. He denied the allegation that he sold the clothes to the said witnesses.

Having heard the evidence of the prosecution witnesses and the appellants' defence, the trial District Magistrate was satisfied that the case had been proved beyond reasonable doubt. He found firstly, that

the 2nd appellant was properly identified by PW3 as the person who sold the clothes to her and secondly, that both appellants were found with stolen properties and were thus implicated by virtue of application of the doctrine of recent possession. They were consequently convicted and sentenced to 30 years imprisonment with twelve strokes of the cane.

Aggrieved by conviction and sentence, the appellants appealed to the High Court. Their appeal was dismissed in its entirety, hence this second appeal.

Each of the appellants lodged a separate memorandum of appeal, but both of them raised six grounds protesting their innocence. Their grounds can however be consolidated into three; that the High Court erred in upholding the decision of the trial court while, **firstly**, the appellants were not properly identified as the persons who sold the clothes to PW2-PW4, **secondly,** that the prosecution evidence did not prove the case beyond reasonable doubt and **thirdly**, that the courts below misapplied the doctrine of recent possession as the appellants' conviction.

At the hearing of the appeal, the appellants appeared in person, unrepresented. On its part, the respondent Republic was represented by Mr. Deusdedit Rwegira, learned State Attorney. When they were called upon to argue their appeal, the appellants opted to hear first, the respondent's submission in response to their grounds of appeal and indicated that they would thereafter submit in rejoinder, if necessary.

Mr. Rwegira informed the Court at the outset that the Republic was not resisting the appeal. According to the learned counsel, the reason for that stance is the apparent defect in the charge sheet. In his brief but focused submission, Mr. Rwegira argued that the charge sheet does not disclose the person against whom the alleged violence was used in the course of the robbery. That defect, he submitted, rendered the charge fatally defective. To support his argument, he cited the cases of **Athumani Juma & 4 others v. The Republic,** Criminal Appeal No.37 of 2009 and **Muhoni Chacha @ Ngw'ena & another v. The Republic**, Criminal Appeal No. 325 & 327 of 2014 (both unreported)

In the alternative Mr. Rwegira agreed with the grounds of appeal raised by the appellants firstly, that the evidence of identification of the appellants as the persons who sold the clothes to the said three witnesses was insufficient and secondly, that the doctrine of recent possession was not, under the circumstances of the case, properly applied. On the question of identification, the learned counsel argued that the evidence of PW2 and PW3 to the effect that they identified the 2nd appellant as the person who sold the clothes to them was deficient. This, he argued, is because they were previously mention to PW1 merely by as "*Wamachinga*" but no descriptions were given.

The learned State Attorney added that the act by PW3, of pointing out the 2nd appellant to the police on the way without any previously given descriptions as well as the identification of the 1st appellant who was found in the appellants' room when the police went to conduct the search, should not be taken to be a reliable evidence of identification.

With regard to the application of the doctrine of recent possession, the learned State Attorney argued that since the clothes

which were alleged to have been stolen from PW1 were not found in the possession of the appellants the doctrine was misapplied against them.

Furthermore, Mr. Rwegira argued that the witnesses did not testify on how they identified any of stolen properties. He submitted that in the absence of description of the properties by special marks, the evidence was not cogent and therefore, the doctrine of recent possession should not have been applied. He cited the case of **Muhoni Chacha @ Ngw'ena** (supra) to bolster his argument that, in order to prove ownership of a stolen property, the person claiming such ownership must state special marks which enabled him to make the identification.

From the stance taken by the learned State Attorney, the appellants did not have much to say in response. They agreed with the submission made in support of appeal and prayed to the Court to allow the appeal.

The first ground upon which the learned State Attorney supported the appeal is based on a point of law that the charge was

defective. We agree with that contention. In the particulars of the offence, although it is stated that in the course of committing the offence, the appellants *"did use actual violence in order to obtain or retain the said property",* the person to whom the alleged violence was directed is not disclosed. This is particularly so when we take into consideration that according to the evidence, the stolen properties belonged to two different persons who in that night slept in the same house and were troubled by the bandits.

It is a mandatory requirement under section 132 of the Criminal Procedure Act [Cap. 20 R.E. 2002] (the CPA) that a charge must contain sufficient particulars necessary to give reasonable information as to the nature of the offence. That section provides as follows:

> *"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged,* ***together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."***

[Emphasis added]

In the case of **Athumani Juma & 4 others** (supra) cited by the learned State Attorney, the appellants were charged with the offence of armed robbery. It was alleged that they committed the robbery at a gun point. In the particulars of the offence however, it was not stated against whom the gun was pointed. The Court observed as follows:

> *"The appellants were charged with eight counts of armed robbery and all of them omitted to mention against whom the gun was pointed at immediately with the intention of stealing the properties or immediately after stealing the properties with the intention of retaining the same after stealing. This was a serious omission on the part of the prosecution."*

The Court then proceeded to quote a passage from the case of **Musa Mwaikunda v. R.** [2006] TLR 387 where it was observed that:

> *"The principle has always been that an accused person must know the nature of the case facing him. This can be*

achieved if a charge discloses the essential elements of the offence."

The rationale behind the requirement to disclose, in the particulars of the offence, the person against whom violence was used, is to afford the accused person sufficient information to enable him defend himself properly. The requirement is therefore founded on the principle of a fair trial. For this reason, the effect of the omission is render the charge defective.

The position was emphasized in the case of **Kashima Mnandi v. Republic**, Criminal Appeal No. 78 of 2011 (unreported). In that case, the appellant was charged with the offence of armed robbery. In the particulars of the offence, the person against whom the alleged violence or threat was directed, was not disclosed. The Court held as follows on the effect of the omission:

"... we are of the settled view that the charge is incurably defective. It is incurably defective because the essential ingredient of the offence of robbery is missing. Strictly speaking for a charge of any kind of robbery to be proper,

it must contain or indicate actual personal violence or threat to a person on whom robbery was committed. Robbery as an offence, therefore, cannot be committed without the use of actual personal violence or threat to a person on whom robbery was committed. Robbery as an offence, therefore, cannot be committed without the use of actual violence or threat to the person targeted to be robbed. So, ***the particulars of the offence of robbery must not only contain the violence or threat but also the person on whom the actual violence or threat was directed."***

[Emphasis added].

On the basis of the foregoing reasons, we agree with the learned State Attorney that the omission to disclose the person against whom the alleged violence was used renders the charge fatally defective. In the event, the trial was fatally defective. In the exercise of the Court's powers under section 4(2) of the Appellate Jurisdiction

Act [Cap 141 R.E. 2002] therefore, we hereby quash the proceedings of the two courts below and set aside the resultant judgments.

That said and done, we remain with the issue whether or not we should order a retrial. It is trite principle that a retrial will be ordered where the trial was defective or nullity. – See for example the case of **Isumba Huka v. The Republic,** Criminal Appeal No. 113 of 2012 (unreported). In that case the Court cited the cases of **Fatehali Manji v. Republic** [1966] E.A. 343 and **Narche Ole Mbile v. Republic** [1993] TLR 253. In the former case, the defunct East African Court of Appeal held ***inter alia*** as follows:

> *" In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame; it does not necessarily follow that a retrial should be ordered; each*

case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it."

Having considered the submission made by the learned State Attorney on his alternative point and the principle governing retrial of cases as stated above, we are of the settled view that under the circumstances of this case, a retrial is not appropriate. **Firstly**, as argued by Mr. Rwegira, the prosecution evidence regarding identification of the appellants as the persons who sold the clothes to PW2, PW3 and PW4 is highly doubtful. **Secondly**, from the evidence, except for the bicycle which was found in the appellants' room, it was not disputed that the clothes were found in possession of the three witnesses (PW2-PW4), not the appellant. For this reason, the doctrine of recent possession was wrongly applied.

Thirdly, the procedure adopted in admitting the exhibits in the trial court (including the bicycle), was improper because, whereas the witness (PW1) did not give any descriptive marks which enabled him to identity the exhibits to prove ownership, the appellants were not,

according to the record, given the opportunity of being heard before the exhibits were admitted in evidence.

Given the above stated deficiencies and irregularities, we are of the considered view that an order of retrial will occasion injustice to the appellants who have already served an imprisonment term of about fourteen (14) years. A retrial will enable the prosecution to become wiser and rectify the stated discrepancies.

In the event, we order that the appellants be released from custody unless they are otherwise lawfully held.

DATED at **TABORA** this 23rd day of August, 2017.

B. M. LUANDA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL.